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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1277

CHESTER C. FOSGATE COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Horrell F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Chester C. Fosgate Company, presenting this petition for writ of certiorari to review a decision of the Fifth Circuit Court of Appeals, shows unto this Honorable Court:

(a) Summary Statement of the Matter Involved.

This is a suit by Chester C. Fosgate Company to recover from the United States certain taxes collected ostensibly under the provisions of Title IX of the Social Security Act with respect to employment during the year 1937, which

the petitioner contends were paid with respect to wages of certain of its employees whose "service" constituted "agricultural labor" within the meaning of Section 907 of said Act (42 U. S. C. A. 1107), agricultural labor having been exempted thereby from the type of services upon which the payroll tax was levied.

The suit was instituted for the recovery severally of taxes paid with respect to labor engaged in, (a) cultivating citrus fruit, (b) harvesting citrus fruit, (c) hauling citrus fruit, and (d) preparing citrus fruit for market.

The United States District Court for the Southern District of Florida allowed recovery of the tax paid with respect to the cultivation labor, but denied recovery as to the balance. Upon an appeal by the taxpayer and a cross-appeal by the United States, the District Court's decision was affirmed, and it is to the part of this decision denying recovery that the present petition is addressed.

The harvesting labor which the lower court held was properly construed by the taxing authorities as being beyond the scope of the term "agricultural labor", was engaged in harvesting citrus fruit on groves owned or leased by the taxpayer and upon groves from which the fruit was purchased by the taxpayer interchangeably and in such a way that no records were available to segregate the services performed as between the various types of groves upon which it might have been performed. These laborers are transported to groves from which it is intended to harvest the fruit and supplied ladders and field boxes in which to place the fruit, each picker supplying his own shears with which the fruit is clipped from the tree and placed by him in a bag of his own hung over his shoulders. This bag has a collapsible bottom through which, when full, the fruit is released into the field boxes.

Other laborers separately classified and styled "loaders", load the field boxes on a grove truck commonly called in the

industry a "goat" truck, which hauls the fruit to the edge of the grove, where it is transferred to a road truck for transportation to a packing house. The loaders also assist in loading empty field boxes throughout the grove.

A third division of employees likewise separately segregated throughout the suit consists of the "goat operators" or those who drive the goat trucks and sometimes assist in loading and unloading the empty field boxes. It is these services which we shall hereafter refer to as "harvesting labor", which the petitioner primarily feels constitutes "agricultural labor" as much so as the cultivation labor with respect to which recovery of the tax was allowed (R. 21, 40-42).

Other services with respect to wages for which the tax was sought to be recovered included those of the truck drivers who haul the fruit from the grove to the packing house and the packing house employees, including general house labor, packers, graders and foremen. We shall refer hereafter to the truck drivers as "hauling labor" and to the others as "packing house labor". The packing house labor we concede is in a doubtful category and either may or may not be agricultural labor within the meaning of the particular Act, and it may be perfectly proper to construe the hauling labor to be incidental to the preparation of the fruit for market rather than incidental to the harvesting of the fruit, but we believe it will be clear that the harvesting labor is "agricultural labor" by any criterion.

The Circuit Court of Appeals rendered its opinion on February 6, 1942 (R. 95), following which the taxpayer submitted a Petition for Rehearing on February 27, 1942, which was denied on March 7, 1942, (R. 107).

(b) Statement of the Jurisdiction.

(1) This petition for certiorari is predicated upon the provisions of Section 240 (a) of the Judicial Code, Act of February 13, 1925, as amended (Chapter 229, 43 Stat. 936).

(2) This action arose under and involves the construction of the Social Security Act of 1935 (August 14, 1935, C. 531, 49 Stat. 639, 642).

Title IX of the Act under which the tax was levied reads in part as follows:

> "Section 901. On and after January 1, 1936 every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percents of the total wages (as defined in Section 907) payable to him, regardless of the time of payment with respect to employment (as defined in Section 907) during such calendar year:
>
> "2. With respect to employment during the calendar year 1937 the rate shall be two per centum." (42 U. S. C. A. 1101).
>
> "Section 907. When used in this title—
>
> "(c) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except—
>
> "(I) Agricultural Labor;—"

The tax was collected in the instances complained of by reason of Section 206 (I) of Regulations 90, promulgated by the Commissioner of Internal Revenue under Title IX of said Act as follows:

> "The term 'agricultural labor' includes all service performed—
>
> (a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops or the raising, feeding or management of livestock, bees, or poultry; or
>
> (b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or

marketing of those materials or articles. Such services do not constitute 'agricultural labor' however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced and unless such processing, packing, packaging, transportation or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations."

The last sentence of said Regulations was construed by the Commissioner to be a condition of all the preceding language. In other words, by the regulation, no services, regardless of functional considerations, were deemed agricultural labor by the Commissioner unless performed in the employ of the owner or tenant of the farm on which was produced the commodity with respect to which such services were performed.

The Act was subsequently amended (August 10, 1939, C. 666, 53 Stat. 1387, 1392), and the amendment effective January 1, 1940, admittedly exempts as "agricultural labor" all of the services with respect to which the tax is here sought to be recovered, providing as follows:

"(L) Agricultural Labor. The term 'agricultural labor' includes all services performed—

(1) On a farm in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity—

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market, or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provi-

sions of this paragraph shall not be deemed to be applicable—in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. As used in this subsection, the term 'farm' includes—fruit-farms, plants, ranches, nurseries, ranges, greenhouses or similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards" (26 U. S. C. A. 1607).

(3) Since there can be no dispute over jurisdiction, it would seem to be surplusage to cite cases believed to sustain the jurisdiction, the problem being to select which cases to cite.

It is plain that the provisions of Section 240 (a) of the Judicial Code heretofore cited is applicable to the decisions of the Circuit Court of Appeals and allows a writ of certiorari to such decisions.

Magnum Import Co. v. *Coty,* 262 U. S. 159;
National Labor Relations Board v. *Waterman S. S. Corp.,* 309 U. S. 206.

It is likwise plain that certiorari has been granted in suits against the United States for the refund of taxes.

George Moore Ice Cream Company v. *Rose,* 289 U. S. 373;
Stahmann v. *Vidal,* 305 U. S. 61.

Further there are numerous instances wherein certiorari has been granted to consider the proper construction of Federal taxing acts.

Lang v. *Commissioner of Internal Revenue,* 289 U. S. 109;
Farmers Loan & Trust Co. v. *Minnesota,* 280 U. S. 204;
Crooks v. *Harrelson,* 282 U. S. 55.

(c) The Questions Presented.

While there is only a single issue presented, that is, the proper meaning of the term "agricultural labor" as used in Title IX of the Social Security Act, and for that reason there will only be one division of the argument, because there is an important basic distinction as to the harvesting services and those performed after the commodity leaves the farm, two separate questions will be here stated:

1. Do services performed during 1937 on the farm in harvesting citrus fruit, regardless of for whom performed, constitute agricultural labor within the meaning of Section 907 (c) of the Social Security Act?

2. Do services performed during 1937 in hauling citrus fruit from the farm to the packing house in the vicinity of the farm and in handling, packing, processing, grading, packaging and delivering it to market or to a carrier for transportation to market, regardless of for whom performed, severally constitute "agricultural labor" within the meaning of Section 907 (c) of the Social Security Act?

(d) Reasons Relied On for the Allowance of the Writ.

1. The Fifth Circuit Court of Appeals in this case has decided an important question of Federal law which has not been, but should be, settled by this Court. The problem of what constitutes "agricultural labor" has consistently been a very troublesome one not only under the Act with which we are here concerned, but under various other social measures in pari materia with the present Act, though following the confusion resulting from administrative action, Congress has resolved the difficulty under the Social Security Act by amending the Act to precisely define the term.

This administrative confusion was already evident at

the time of the adoption of the Fair Labor Standards Act of 1938, and a precise definition is likewise therein adopted (29 U. S. C. A. 203 (f), June 25, 1938, C. 676, Section 3, 52 Stat. 1060).

However, the National Labor Relations Act was adopted at about the same time as the Social Security Act, and there Congress not having anticipated the difficulty which would result from administrative action, did not adopt a special definition of the term (29 U. S. C. A. 151, July 5, 1935, C. 372, Section 1, 49 Stat. 449), and the term as used in that Act seems to have been defined insofar as it applies to the packing house labor through judicial action. *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d), 76 (C. C. A. 9th) Cert. Deni. 310 U. S. 632.

In the latter case there is dictum to the effect that both the cultivation and harvesting labor would have been regarded as being within the purview of the term, though only the packing house labor was directly involved in the action, and it is largely because of this decision that we must carefully preserve the distinction between the cultivation and harvesting labor on the one hand and the packing house labor on the other, the latter having been held to be not included within the term under the National Labor Relations Act, though we can still rely upon considerations of legislative history to distinguish the legislative intent in each instance.

We have been advised and therefore say that there is litigation both in existence and in contemplation in the various District Courts of the country involving a consideration of this identical term, and it is probable that a judicial conflict will eventually result, though this has not yet occurred; that many hundreds of thousands of dollars in claims for tax refunds have been filed and will be determined by a decision in this case.

2. The Fifth Circuit Court of Appeals has decided in this case a Federal question in a way probably in conflict with applicable decisions of this court.

The decision in this case conflicts with the several decisions of this court establishing the principle that effect should be given to the ordinary meaning of words used by Congress, in that the court below did not apply the plain ordinary meaning of the term "agricultural labor" through excluding from the narrowest meaning of that term labor performed in harvesting citrus fruit.

U. S. v. *American Trucking Association,* 310 U. S. 534;
U. S. v. *Wurts,* 303 U. S. 414;
Deputy v. *DuPont,* 308 U. S. 488;
Browder v. *U. S.,* 312 U. S. 335.

The decision of the court below conflicts with the several decisions of this court to the effect that statutes should be construed so as to avoid unjust and oppressive consequences, in that the effect of the decision is to confirm the exemption to a few large operators who are able to integrate their activities and to deny the exemption to those who serve the small farmer.

Farmers Loan & Trust Company v. *Minnesota,* 280 U. S. 204.

The decision below likewise conflicts with that line of decisions which hold that the broad policy of Congress should be effectuated in construing a statute in that the court ignores the policy of Congress to favor agriculture generally in a broad sense.

Nardone v. *U. S.,* 308 U. S. 338;
Inland Waterways Corp. v. *Young,* 309 U. S. 517;
Carmichael v. *Southern Coal & Coke Co.,* 301 U. S 495;
Helvering v. *Bliss,* 293 U. S. 144.

In giving undue weight to a segregated consideration of one statement contained in a Congressional Report, the

courts below likewise conflicted with those decisions of this court which hold that in determining the effect of legislative history, weight should be given to the statements of the floor leaders advocating a measure as well as to Committee Reports.

Helvering v. *Twin Bell Oil Syndicate*, 293 U. S. 312;
Wright v. *Mountain Trust Bank*, 300 U. S. 440.

The decisions below further conflict with the decisions of this court in failing to give proper treatment to the 1939 Amendments of the Social Security Act as clarifying of the previously existing congressional intent.

Luckenbach Steamship Co. v. *U. S.*, 280 U. S. 173;
Helvering v. *New York Trust Co.*, 292 U. S. 455;
Helvering v. *Twin Bell Oil Syndicate*, 293 U. S. 312.

Finally, in neither affirming nor upsetting the administrative regulation and the administrative interpretation thereof, but in lieu thereof attempting to superimpose thereon a construction justified by neither and contrary to any concepts previously suggested by either party, yet attempting to give great weight despite such inconsistencies to the regulation, the decision of the court below further conflicts with the principles established by this court as to the effect to be given to administrative interpretations of the law, particularly that principle which holds ambiguous regulations to be without persuasive force.

Sanford v. *Commissioner of Internal Revenue*, 308 U. S. 39.

Respectfully submitted,

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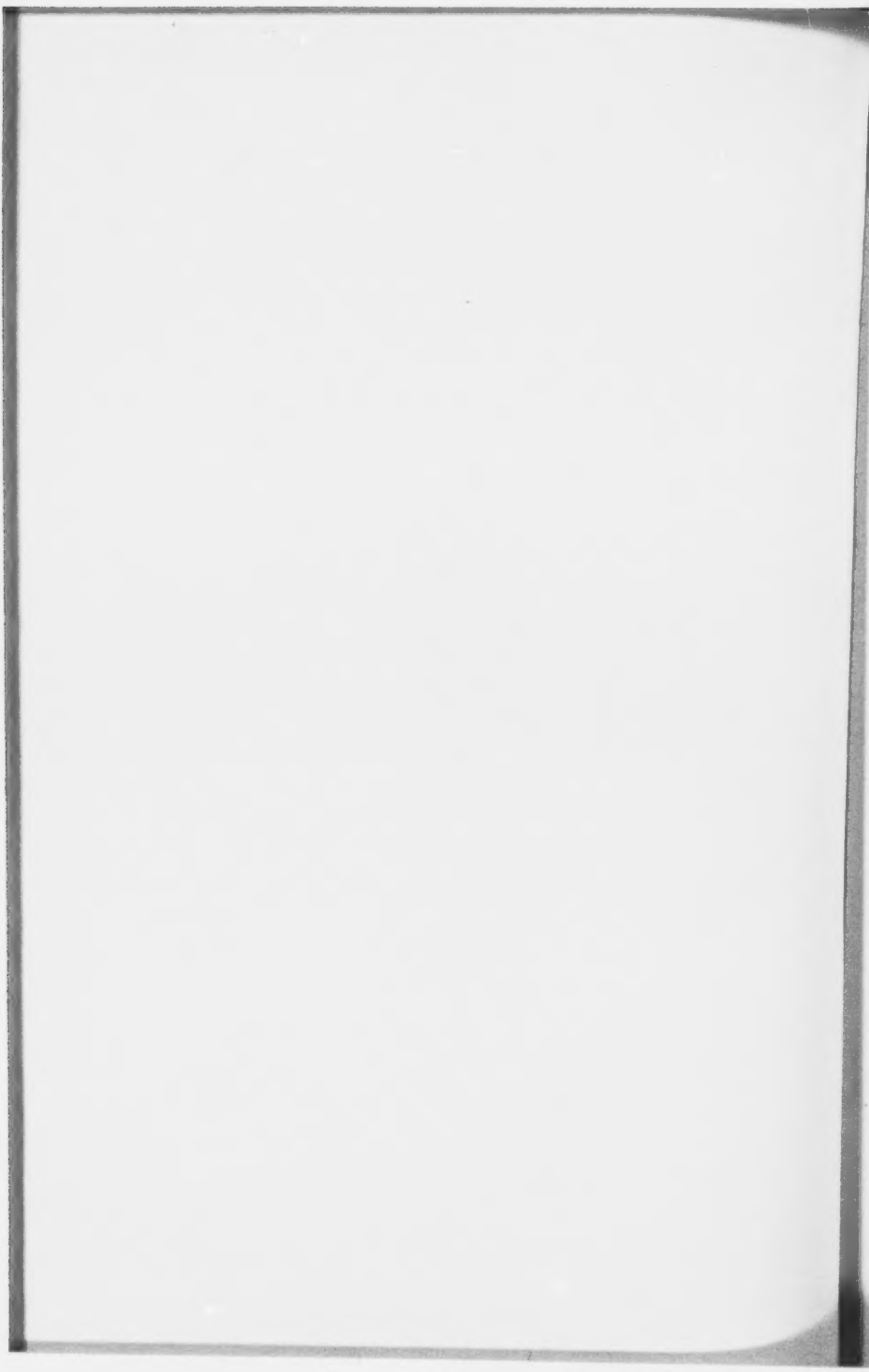

SUPREME COURT OF THE UNITED STATES

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No. 1277

CHESTER C. FOSGATE COMPANY, A FLORIDA CORPORATION,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I. The Term "Agricultural Labor" as Used in the Social Security Act Must Be Broadly Construed.

We are not here to argue whether Congress should have included or excluded agricultural labor in enacting the social security laws. Our sympathies and our prejudices may well be laid aside, for Congress has determined policy for us in excluding "agricultural labor", not "farm labor", "farm hands", or some other class of labor, from the provisions of this act. We are solely concerned with defining the term as it may be applied to the set of facts concerning us. In evolving that definition we are not thrown upon our own resources, but are governed by well-known principles of construction, applied indeed in *United States* v.

Turner Turpentine Company, 111 F. (2d) 400, 404 by the Fifth Circuit Court of Appeals to the particular term as used in this particular act, where it is said:

> "It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor', it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates."

II. It is Still a Basic Principle of Construction That Effect Should Be Given to the Ordinary Meaning of Words Used by Congress.

In *United States* v. *American Trucking Associations,* 310 U. S. 534, 84 L. Ed. 1345, the principle was thus stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

In *United States* v. *Wurts,* 303 U. S. 414, 82 L. Ed. 932, it was said:

> "Congress may well be supposed to have used language in accordance with the common understanding."

And again in *Deputy* v. *DuPont,* 308 U. S. 488, 84 L. Ed. 416, the proposition was stated as follows:

> "Popular or received import of words furnishes the general rule for the interpretation of public laws."

The only exception to this cardinal principle of construction is delineated in *United States* v. *American Trucking Associations, supra,* wherein it was pointed out that the courts could depart from the plain meaning of words only when such plain meaning has led to absurd, futile, or unreasonable results, "plainly at variance with the policy of the legislation as a whole."

As we shall see, the application of the plain meaning of the term "agricultural labor" to the facts of this case, does not lead to results which are either absurd, futile, or unreasonable, and, in fact, is in plain accord with the policy of the legislation as a whole. It is only by departing from such plain meaning that absurd, futile, or unreasonable results are obtained, which results are "plainly at variance with the policy of the legislation as a whole."

But even if it were to be concluded that the application of the term "agricultural labor" to the services with which we are here concerned constitutes in some instances a departure from the plain meaning of the term, such a departure would be justified in order to avoid absurd, futile, or unreasonable results "plainly at variance with the policy of the legislation as a whole."

We shall save for a later portion of this brief an examination of the definitions and various decisions which reflect the meaning of the term "agricultural labor."

III. The Known Policy of Congress Favors a Broad Construction of the Term.

In *Nardone* v. *United States,* 308 U. S. 338, 84 L. Ed. 307, it was said:

> "Meaning must be given to what Congress has written even if not in explicit language, so as to effectuate the policy which Congress has formulated."

A broader consideration of congressional policy than that which may be embodied in the express act itself is a perti-

nent source for inquiring as to the policy expressed in the act. This has recently been exemplified in *Inland Waterways Corporation* v. *Young,* 309 U. S. 517, 84 L. Ed. 901, where the court said in considering a banking act:

> "In other words, the history and purposes of the statute and the traditional policy of the National Government in utilizing the National Banks as fiscal agencies must give meaning to the silence of the act."

It is also true, as has been recently reiterated in *Haggar* v. *Helvering,* 308 U. S. 389, 84 L. Ed. 340, that "all statutes must be construed in the light of their purpose."

A consideration of the Social Security Act clearly shows that its purpose was not to raise revenue for the operation of government, but rather was to provide a revolving system of benefits, and involved a serious dual consideration of the adequacy of the funds raised to meet the claims for benefits which might have been anticipated.

So, we are concerned, not solely with the difficulty of the collection of the tax in determining the scope of the exemption, but likewise with the difficulty of the commensurate benefits which flow from the fund thus created. The particular title of the act with which we are here concerned is designed to create an unemployment insurance fund so as to relieve the economic ravages of unemployment. The obvious difficulties of providing a system to insure employment in the field of agriculture are numerous.

For example, the court may take judicial notice that the production, harvesting and marketing of fresh citrus fruits is a highly seasonal industry with employment not dependent upon the will of man or upon any system that man has yet been able to devise, but rather upon the condition of the seasons and the condition of the weather within particular seasons. At best, such work must be sporadic. It is reasonable, therefore, to assume that Congress had in mind the

terrific burden this type of labor would constitute upon the fund created by the tax to be levied. It is plain, therefore, that the reasoning which prompted some State courts to so construe the term as not to apply to the mushroom growing industry (*Great Western Mushroom Co.* v. *Industrial Commission*, 82 Pac. (2d) 51, 103 Colo. 39) and to the greenhouse industry (*Park Floral Co.* v. *Industrial Commission*, 91 Pac. (2d) 492, 104 Colo. 350), upon the theory that the labor was not seasonal, can have no application here. Rather when considered in reverse, such reasoning affords judicial support to the conclusion that the type of work here involved represents some of the difficulties which Congress sought to avoid in exempting agricultural labor.

In further considering the policy of Congress, weight must be given to the known policy of Congress to favor agriculture in the interest of sound economic adjustment by benefit payments and by many other means, rather than to burden it with taxes and regulations that might well be made to apply to others. In this connection, we call attention to *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 512, 81 L. Ed. 1245, 1255, where Justice Stone, in considering the constitutionality of the Unemployment Compensation Act of Alabama, which was attacked on the ground that the exemptions were arbitrary, said:

> "The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficial enterprise. This court has often sustained the exemption of charitable institutions, * * * and exemption for the encouragement of agriculture."
>
> *American Sugar Refining Co.* v. *La.*, 179 U. S. 95, 45 L. Ed. 105;
>
> *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 291, 79 L. Ed. 1444.

Nor can we forget that Congress in its treatment of agriculture has never adopted a view so narrow as that resulting either from the administrative interpretation of the regulation under which the tax was collected, or the judicial conclusion upon which judgment was predicated, though Congress has many times dealt with the subject.

It is interesting to note, for example, that the Marketing Agreement Act, 7 U. S. C. A. 608(c), an act administered by the Secretary of Agriculture and designed for the benefit of agriculture, specifically applies by its expressed terms to those engaged in a similar business to the Chester C. Fosgate Company, and indeed the only other occasion on which the Chester C. Fosgate Company's name has appeared in the recorded report of any court was in conjunction with the administration of that act. *Chester C. Fosgate Company* v. *Kirkland,* 19 Fed. Supplement 152.

IV. The Term "Agricultural Labor" is a Wide and Comprehensive Term. It is Defined as:

> "Art or science of cultivating the ground, including harvesting of crops and rearing and management of live stock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use, and their disposal by marketing or otherwise."—Webster's International Dictionary.

No dictionary, no legislative enactment, and no decision of any court has been cited by the appellee, or located by the appellant which supports the limitation upon the term "agricultural labor" sought to be placed thereon either by the regulation which purports to define it, or by the interpretation given the term by the court below.

In other words, we can state as definitely as our research permits that nowhere either in our literature or our body

of judicial decision has the term "agricultural labor" been limited either by the condition of the relationship of the employer to the land on which the product was produced with respect to which the labor was performed, or the relationship of the employer to the product with respect to which the labor was performed. The regulation seeks to place the one condition upon the term and the decision of the court below to superimpose the other condition upon the term.

To support this statement, we feel that it will first pay us to examine carefully the decisions which have attempted to be advanced in refutation of the statement.

The first case upon which the United States most strongly relies is that of *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9th), Cert. deni., 310 U. S. 632. As is indicated by its style, this case arose under the National Labor Relations Act (29 U. S. C. A. 151 et seq.), wherein it is provided that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute, or because of any unfair labor practice, * * * but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

It must be clearly borne in mind that this case dealt only with "the workers in petitioner's packing house," that is, employees similarly engaged to those involved in this suit designated as Items 6 to 10, inclusive, on the employment chart (R. 21) and did not include any consideration whatsoever of those here involved designated as Items 1 to 5, inclusive, on said employment chart (R. 21). As a matter of fact, a distinction is expressly made between the operations of care, cultivation, picking and delivery of the products on the one hand, and the processing, grading, packing and

marketing of the products on the other hand in the language quoted by the court, apparently with approval, from an unreported case of an Oregon Circuit Court.

It is true that in the course of the opinion the Ninth Circuit Court of Appeals fell into the error of confusing the term "agricultural labor" with the term "farm labor," citing a number of cases, none of which support a narrow definition of the term "agricultural labor." These cases all arose under Workmen's Compensation Acts, which we shall subsequently consider, in states where the Workmen's Compensation Act exempted "farm" labor, but had no reference to "agricultural labor." However, we submit that these conclusions constitute only dictum, because the case was basically decided in the light of the purpose of the National Labor Relations Act as applied to the functional nature of and the conditions under which the labor was performed in the packing house of the petitioner involved in the North Whittier Heights case.

We freely concede that the packing house labor, or the class of labor involved in the North Whittier Heights case, falls close to the perimeter of the definition of "agricultural labor" and is probably in that doubtful category where all aids to construction can be utilized. Under the National Labor Relations Act these aids to construction quite properly place the packing house labor beyond the scope of the term, but we nevertheless feel that in the case at bar the aids to construction have the contrary effect, and the field and harvesting labor is clearly within the term without resort to construction. The following portion of the opinion clearly shows the reasoning upon which the decision was predicated:

> "The purpose of the act is clear and we find the act specifically excepting three kinds of employees from its provisions. It would seem profitable to consider whether or not there is a 'common denominator' in

these three exemptions. We think there is. Why is 'any individual employed by his parent or spouse' exempted? Because (not excluding other reasons) in this classification there never would be a great number suffering under the difficulty of negotiating with the actual employer, and there would be no need for collective bargaining and conditions leading to strikes would not obtain. The same holds good as to 'domestic service', and the same holds good as to 'agricultural labor', if the term be not enlarged beyond the usual idea that the term suggests. Enlarge the meaning of any of these terms beyond their common usage, and confusion results."

An analysis of the ordinary definition of the term indicates the distinction. It is clear that even in the narrowest sense, the definition of the term "agriculture" includes harvesting, but only in its broader sense, and then only to a variable extent does it include preparation of the product for market.

Clearly in the light of the purpose of the National Labor Relations Act the Ninth Circuit was justified in applying a narrow definition to the term by excluding from it those employees who would only be included in the broader sense and to a variable extent. Nothing contained therein affects the decision of this Court. We have seen that the broader view of the term as used in the act with which we are concerned has already been designated as the proper rule of construction.

The other decision upon which appellees relied quite strongly is that of *H. Duys & Co.* v. *Tone* (Conn.), 5 Atlantic (2d) 23, which was a case arising under the Connecticut Unemployment Compensation Act decided prior to the decision in the Turner Turpentine Co. case, and which involved only employees of an agency to process, pack and market tobacco, whose services were performed at and beyond point of delivery at the warehouse. As in the North

Whittier Heights case, the court was concerned only with employees whose services admittedly fall only within the broader definition of the term "agricultural labor." A narrower rule of construction was applied than that which was indicated as the proper rule of construction by the 5th C. C. A. The greatest stress was laid on the fact that the Connecticut act was adopted in the light of both the existing federal act and regulation then in effect, and it was concluded that by reason of that fact the existing regulation, which is here under attack, became a part of the Connecticut statute. The result of the decision was to reverse the trial court. Though remaining wedded to its prior decision just discussed, the Connecticut court has since expressed a relaxed view of the question in *American Sumatra Tobacco Corp.* v. *Tone* (Conn.), 15 A. (2d) 80, on the basis of its approval of the decision in the Turner Turpentine Co. case.

Although the Fifth Circuit Court of Appeals had previously held that the term "agricultural labor" must be given a broad meaning in the light of the Social Security Act, because of the confusion between cases defining that term on the one hand and those defining farm labor or some similar term on the other hand, we feel that the importance of this case justifies reviewing once more that question. When the distinction is understood and clearly delineated there is little or no confusion among the authorities, and insofar as it applies to labor performed up to the point where the fruit enters the packing house, there is no confusion whatever in the decisions.

The Workmen's Compensation Acts commonly exempt "farm labor" from their operation, and in 71 C. J. 375, it is said:

> "The question whether or not an injured employee is excluded from a compensation act exempting this

type of employee has been said to be the subject of an irreconcilable conflict, depending somewhat on the varying statutes."

It was possibly to avoid this conflict that the term "agricultural labor" was used. The term "agricultural labor" had been judicially defined to be of a broader and more comprehensive import than the term "farm labor" used in some of the state statutes.

Thus, we find in 71 C. J., published in 1935:

"(c) Agricultural and Farm Work Distinguished.—

"(1) '"Agricultural laborers" (is) a term broader and more comprehensive than "farm laborers".' Davis *v.* Industrial Commission of Utah, 206 P. 267, 269, 59 Utah 607.

(2) 'Some of the acts except "farm laborers", while the Idaho statute excepts "those engaged in agricultural pursuits", the latter phrase being much more comprehensive than the former.' Cook *v.* Massey, 220 P. 1088, 1090, 38 Idaho 264, 35 A. L. R. 200.

(3) 'The terms "farm employee" and "agricultural employee" as used in this State have substantially the same meaning. If there is any difference, the latter expression, which necessarily includes the former, has a broader meaning.' Fleckles *v.* Hille, 149 N. E. 915, 83 Ind. App. 715.

(4) 'There is some discussion * * * upon a supposed distinction between one engaged in agricultural pursuits and one engaged in farm labor. Such a distinction doubtless exists in the sense that one who is engaged in the pursuit of agriculture may not necessarily be a farm laborer, but it is quite evident that every farm laborer is engaged in an agricultural pursuit.' Keefover *v.* Vasey, 199 N. W. 799, 801, 112 Neb. 424, 35 A. L. R. 191."

71 C. J. 376. Note (c).

In *Lowe* v. *North Dakota Workmen's Compensation Bureau* (N. D.), 264 N. W. 837, 107 A. L. R. 973, previously cited by the Fifth Circuit Court of Appeals with approval in the Turner Turpentine Co. case, the court discussed the subject as follows:

> "The plaintiff was employed by the owner of a combine who had contracted to harvest and thresh the crops of a farmer. It is evident the cutting and threshing were all one process because of the machine used. While so working, the plaintiff was injured and now seeks to recover compensation from the workmen's compensation fund.—
>
> "It is admitted that if plaintiff was injured while employed in 'agriculture', as contemplated by the Workmen's Compensation Act, he has no claim against the fund.—
>
> "Section 1 of the Workmen's Compensation Act clearly intends to furnish relief for all workmen engaged in hazardous employments, and were it not for the exemption, those employed in agriculture would be covered. The exception is to be construed strictly; but even with this in mind, it must be clear that the man who plows a field and sows a crop is engaged in agriculture whether he does it for himself, or as an employee of the owner, or on an independent contract. See Sylcord *v.* Horn, 179 Iowa, 936, 162 N. W. 249, 253, 7 A. L. R. 1285."

The following cases were cited by the defendant in the court below to support a narrow definition of the term "agricultural labor", and we presume them to have been the best cases they could locate upon that point:

Maryland Casualty Co. v. *Dobbs,* 70 S. W. (2d) 751, Tex. Civ. App. —;

Boyer, 65 Ind. App. 408, 117 N. E. 507;

White v. *Loades,* 178 App. Div. 236, 164 N. Y. S. 1023;

Vincent v. *Taylor Bros.,* 180 App. Div. 818, 168 N. Y. S. 287;

Noshike v. *Industrial Commission,* 83 Colo. 556, 266 P. 1114;

Charpentier v. *Cumming,* 178 Minn. 519, 227 N. W. 663, 107 A. L. R. 977;

Hart-Parr Co. v. *Barkley,* 231 Fed. 913 (C. C. A. 8th);

Hahn v. *Grimm,* 101 Ind. App. 74, 198 N. E. 93;

Roush v. *Heffelbower,* 225 Mich. 664, 196 N. W. 185;

Jones v. *Industrial Commission,* 55 Utah 489, 187 P. 883, 886;

Sylcord v. *Horn,* 179 Iowa 936, 162 N. W. 249, 252.

Every one of these cases dealt with the term "farm labor", or "farm and agricultural labor", as used in various statutes. In the latter instance the courts, where the combined term has been used, have apparently applied it in the narrower sense, allowing the first word to control the second. An additional case cited by the appellees, *Mundell* v. *Swedlund,* 59 Idaho 29, 80 Pac. (2d) 13, was concerned with the term "agricultural pursuit". However, the decision of the case was predicated upon the fact that the machinery utilized was not harvesting or threshing machinery, but a grinding outfit in the nature of a mill, which changed the form of the product. Idaho falls within the uniform line of cases which gives a broad meaning to the term "agricultural labor". *Cook* v. *Massey,* 220 P. 1088, 38 Idaho 264, 35 A. L. R. 200.

Therefore, we may safely conclude that there is no authority which casts the least doubt upon the correctness of the previous decision of the Fifth Circuit Court of Appeals to the effect that "an examination of the cases * * * convinces that in modern usage this is a wide and comprehensive term and that statutes using it without qualification must be given an equally comprehensive meaning". *United States* v. *Turner Turpentine Company,* 111 F. (2d) 400, 405.

V. The Definition Proposed by Defendant's Regulation Must Be Rejected.

1. The Regulation Provides a Narrow Definition of the Term to be Defined.

It requires no learned lexicographer to see that the regulation, Section 206(1), Regulations 90, *supra,* fails to meet the requirement of construction set down in the Turner Turpentine Co. case. This regulation superimposes upon otherwise acceptable definitions of the term "agricultural labor", a concept foreign to the term as used in the Act, that is, a classification based on the relationship of the employer to the land, rather than upon a classification of "service" as contemplated by the act.

Had Congress intended the exemption to be determined according to the status of the employer rather than the nature of the service, it does not seem it would have used the language, "The term employment means any service * * * except * * * agricultural labor" (42 U. S. C. A. 1107) after levying the tax only "with respect to employment" (42 U. S. C. A. 1101).

If this purely artificial concept as applied to the term "agricultural labor" had been intended by Congress, simple language to express such intent would doubtless have suggested itself in the drafting of the Act. Certainly the language used does not express this concept, and even more certainly the imposition of this concept greatly narrows the scope of the term, not only in its broader meaning, but in its ordinary narrower meaning.

2. Classification Based on Employer's Relationship to Land Leads to Absurd Results and Distinctions Never Contemplated by Congress.

If Congress had intended to distinguish the exemption on the basis of whether or not the employer was a producer

who limited his operations to his own production, it would not have used the language of the regulation we are considering. It was concerned with defining a farmer under the Bankruptcy Act and used far different criteria.

For instance, suppose the Ford Motor Company owned a thousand acres formerly used as a testing ground. On abandoning its use for that purpose, the board of directors decided the economical thing indicated by the fertility of the many small farms in the area was to plant corn on that plot to be later used in manufacturing a plastic. The company owning the land, the employees engaged in producing and harvesting the corn would be "agricultural labor" within the meaning of the regulation and therefore exempt from the burdens and benefits of the act.

Meanwhile, ten farmers in the vicinity were each eking out a marginal existence on a contiguous fifty-acre tract. Seeing the success of Ford's large-scale operation they formed a caretaking company which accumulated necessary expensive equipment and took care under contract of the production, harvesting and marketing for the ten farmers who were themselves employed by the caretaking organization. These farmers, under the regulation, would not be "agricultural labor" and would therefore be subjected to the burdens of the act.

Did Congress intend this distinction under the 1935 Act when it used the term "agricultural labor"? Yet this is the essence of the problem confronting us.

If we went into a grove and saw two negro field hands picking adjoining rows of citrus with identical equipment in an identical manner, we couldn't say whether either, or both, was performing agricultural labor under the regulation. The services of a surveyor, an abstractor and a lawyer would be required to make the determination. And then a long litigation might have to follow before a final conclusion could be reached so as to settle the land line, the

title of the owner, the connection between the owner and the field hand's employer and the connection between the field hand and his employer. When all that is finished it might be concluded under the regulation that one negro was performing agricultural labor, whereas the other was not, even though both were performing the identical function for identical wages to be paid by an identical employer.

In other words, it seems plain that the act seeks to exempt the service rendered, or to classify employees according to the nature of the service rendered by them. The regulation on the other hand seeks to predicate the determination upon the nature of the employer's business rather than upon the nature of the service rendered the employer. Even if this concept were permissible the regulation nevertheless fails to make any proper classification of the employer, because under the regulation many employers who are distinctly not farmers would enjoy the exemption, whereas, many other employers who are basically farmers would not enjoy the exemption. So, even if the term is treated from the viewpoint of the classification of the employer rather than the employee, the regulation is still invalid, because it still draws an arbitrary classification plainly beyond the scope of congressional intent.

3. The Regulation Operates to Favor the Large as Against the Small Producer.

Only the largest producers of citrus can afford to directly employ their own grove workers for the reason that only they can afford to own the necessary equipment. And only a handful of the very largest can afford to employ their harvesting and packing workers, for the same reason.

These under the regulation do not have the burden of paying the tax or the burden of keeping the cumbersome records required. Yet this burden is thrust upon the small

producer who can least afford it. Is this result within the purview of the known policy of Congress?

It is now recognized by all competent economic authorities that the incidence of cost with respect to the packing of fresh fruits and vegetables, or other highly perishable commodities prior to their reaching a terminal market for distribution for consumption inevitably falls upon the producer as much so in the instance where he performs such services himself as where they are performed for him by another, either under contract or by purchase, the market being fixed at the centers of consumption without respect to such cost. This is so axiomatic as not to require a voluminous discussion or citations of authority. We are confident that there is no competent authority which refutes the statement.

Indeed it is borne out and exemplified in the reports of both the Senate and House Committees which dealt with the Social Security Act Amendments of 1939, wherein it is said:

> "Your Committee believes that greater exactness should be given to the exception (agricultural labor) and that it should be broadened to include as "agricultural labor" certain services not at present exempt (under the administration of the existing law), as such services are an integral part of farming activities. In the case of many such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones."

(Committee on Ways and Means, H. Rep. No. 728, 76th Congress, First Session, Page 51; Committee on Finance, S. Rep. No. 793, 76th Congress, First Session, Page 61.)

It is plain from the provisions of the bill itself that Congress did not intend to discriminate so as to favor the large producer who could afford to integrate under his own ownership and management all of the operations essential to getting his fruit to market, as against the small producer who could not.

4. No Dictionary or Judicial Decision Supports the Regulation.

We have already examined in some detail the decisions treating of the term, and simply repeat again for the sake of the full consideration of the particular regulation being here discussed that no support for it can be found in any dictionary or in any court decision which justifies the concept of the employer's relationship to the land on which the products with respect to which services were rendered were produced as a proper condition of the term "agricultural labor."

5. The Administrative Practice in Defining Terms is Not Binding Upon the Courts.

We submit that even if the regulation itself were valid, it is nevertheless ambiguous and does not support the interpretation given to it as applied to all of the classes of labor with which we are concerned.

It should be noted that the regulation is divided into two paragraphs separately set out and designated respectively (a) and (b).

The first portion of the regulation recognizes as agricultural labor services performed on a farm without respect to the nature of the employer.

The second section of the regulation then exempts the "packing, packaging, transportation or marketing" of articles from materials produced on a farm, and goes on to

provide that such services, however, would not constitute agricultural labor, unless performed by an employee of the owner or tenant of the farm on which the materials were produced, and unless such processing, packing, packaging, transportation or marketing were carried on as an incident to ordinary farming operations. We submit that a proper interpretation of the regulation would limit the application of the condition regarding the status of the employer solely to the class of service discussed in sub-paragraph (b), exclusive of those on a farm, described in sub-paragraph (a).

Indeed, in considering the regulation in the light of the accepted definitions of agricultural labor, it is more than likely that the regulation was originally intended to have this effect. The services described in sub-paragraph (a) of the regulation are within the narrowest purview of the definition of agricultural labor, whereas, as we have previously noted, the services described in sub-paragraph (b) containing the objectionable condition are only within the scope of the term in its broader sense and only to a variable degree, and the condition was doubtless designed to limit the variability of the degree to which such services would be considered within the term for administrative purposes.

It is unquestionably the law that even where an administrative regulation might otherwise deserve some weight, an ambiguous regulation is without persuasive force in determining the true construction of a Federal law. *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 84 L. Ed. 20.

But regardless of whether the regulation is doubtful or not, it still has only a limited effect upon the problem of construction, as was pointed out in the last cited case:

> "Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict

with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law.

"But Courts are not bound to accept the administrative construction of a statute, regardless of consequences even when disclosed in the form of rulings * * * We should be free to reject the practice when it conflicts with our own decisions."

VI. The Trial Court's Definition Making the Incident of Ownership Determine the Character of the Work is Without Support, and Has Been Judicially Disavowed.

No dictionary, no judicial decision, no statute, no regulation and no contention of either party supports the trial court's definition of the term "agricultural labor." We have been able to locate only one case wherein the concept has ever been discussed, and that case refutes it as a valid concept of the term. *Melendez* v. *Johns* (Ariz.), 76 Pac. (2d) 1163.

In view of this great negation, it may pay us to examine briefly into the reasoning and background from which the trial court's decision sprung with sudden surprise.

The trial court was quick to recognize the erroneous nature of the regulation which the Government sought to support, and held such regulation invalid (R. 68-71) and sought to follow the decision of the Fifth Circuit Court of Appeals in the Turner Turpentine Co. case (R. 66).

However, in the course of the argument the Court's attention was attracted to the following language contained in the amended act defining "agricultural labor" and placing a limitation upon the definition, as follows:

> "The provisions of this paragraph shall not be deemed to be applicable with respect to services performed * * * in connection with any agricultural or horti-

cultural commodity after its delivery to a terminal market for distribution for consumption." 26 U. S. C. A. 1607(1) (4).

The court then concluded that as soon as the fruit was sold by the producer, regardless of to whom it was sold, it had reached a "terminal market" within the meaning of the statutory limitation upon the statutory definition. Apparently overlooking the fact that this condition was limited to the class of labor described in sub-section (4) of the definition, the court went on to apply the criterion not only to the class of labor described in paragraph (1), to which the condition thus erroneously interpreted had no application under any circumstances.

However, it is obvious from the record that the plaintiff does not operate a "terminal market for distribution for consumption", but only grows and buys fruit on the tree for the purpose of harvesting, packing and delivering it to "a terminal market for distribution for consumption." (R. 33-36, 40).

Citrus fruit to be shipped in Florida must be graded and packed in accordance with prescribed standards (Chapter 16854, Laws of Florida, Acts of 1935, Sections 10-13, which are not set forth because the point is too collateral to justify the printing involved). This is true not only because of the laws of Florida, but because of the existence of a Federal grade and size marketing agreement affecting the commodity (7 U. S. C. A. 608(c)). In other words, the functions performed by the laborers are part of a continuing operation from the planting of the tree to the delivery of the fruit to market, and an absolutely necessary condition to the delivery of the fruit to market. It is the same type of continuing operation referred to in *American Sumatra Tobacco Corp.* v. *Tone* (Conn.), 15 A. (2d) 80.

It seems that this condition upon the definition of agri-

cultural labor on its face cannot be applied to the plaintiff here. It is quite plainly designed to limit the definition of the term to labor performed in the area where the fruit is produced, essential to the procedure of getting it to the place where it is consumed. None of the fruit handled by the plaintiff is consumed in Florida, much less in the area where produced, other than possibly a few oranges which the laborers may themselves eat during the process of packing. Indeed, as we have seen, those charged with administration of the Act have never given the language this construction, and all of this type of labor has been recognized as exempt since January 1, 1940, under the amendment.

However, since the language was misconstrued by the trial court, it might be important to consider congressional intent, and, consequently, we call attention to some of the remarks of Congressman Buck, the member of the House Ways and Means Committee, which reported the amended act favorably, and who directed its passage through the House (Vol. 84, Part 6, Congressional Record, 6710 et seq., 6862 et seq.).

We note these remarks not with the view that they are binding declarations of congressional intent, but because they fortify what is otherwise clear from the language of the Act and other legitimate aids to construction.

It is definitely proper in construing the statute to have recourse to the statements made by those in charge of the measure during its consideration.

United States v. *Great Northern R. Co.*, 287 U. S. 14;
Wright v. *Mountain Trust Bank*, 300 U. S. 440.

In weighing these collateral aids to construction, the limitation should, of course, be borne in mind that congressional debates may not be used to change or vary the meaning of the words of a statute, but they may be considered

as reflecting light upon its general purpose, and the evils which it sought to remedy.

Humphrey v. *U. S.*, 295 U. S. 602.

With regard to the concept superimposed by the trial court upon the term "agricultural labor", Mr. Buck, in advancing the passage of the Act through the House of Representatives, said:

> "These curious distinctions produce inequities among people operating in the same commodities in the same localities, and certainly this is an injustice. Now assuming there is merit to what I said about the reason for the exemption of agricultural labor, until such time as both employers and employees have been educated to the point where they will want to be included, * * * then we ought to have this clarifying amendment, this defining amendment which is based on the theory that it is not by whom a man is employed, but the nature of the work he is doing that constitutes the agricultural labor."

Earlier in his remarks, Mr. Buck covered some of the other problems which are here involved, as follows:

> "Let me call attention to some of the other rulings. In some cases the rulings have worked to the advantage of farmers who have large acreage. I stated a few minutes ago that I am a farmer. I have a fairly large acreage, and on it I have a packing plant where I can clean, wash, and pack my own fruit.
>
> "That labor is exempt. If 10 or 20 of my neighbors do the same thing in the same way, if they get together and build a cooperative packing shed on the railroad and wash their apples or their pears, and pack their fruit and use the same type of labor under the same circumstances, they are now taxed under the rulings of the Bureau of Internal Revenue, because the work is done off of a farm. Where is the justice in that, in making the small producer suffer?

"Let me add that the Pure Food and Drugs Act of the United States and many State laws require rigid inspection of agricultural commodities, and in the case of apples and pears require that they be washed before they can be shipped in interstate commerce. The average farmer is in no position to handle this work by himself on his farm. He must cooperate with his neighbors in a common packing plant where his fruit can be washed, his beans graded and cleaned, and so on. All these processes are a part of the preparation of the farm crop for market, and it has been unfair and inequitable for the Bureau of Internal Revenue to make rulings which tend to restrict all of these operations to a given farm. Their rulings have worked to the advantage of those who have large acreages on which they can carry through a complete agricultural operation from producing a crop to delivering for transportation to market. It might be very fairly said the present amendment is intended not merely to state clearly what Congress considers are agricultural operations but to remove the inequities that now exist." Id, Page 6864-6865.

It seems quite clear that Congress never intended to classify "agricultural labor" according to the status of the employer.

To conclude the discussion of the imposition of the artificial concept of the relationship of the employer to the product as a condition for determining what is agricultural labor, we quote from *Melendez* v. *Johns, supra:*

"The other point made by petitioner, if we understand him aright, is that because Johns and Brand were buyers and shippers of lettuce Melendez and his coemployees engaged in harvesting the lettuce were not agricultural workers, but industrial workers. We get this thought from the petitioner's fourth proposition of law, which is: 'Harvesting of crops when it is not a part of the ordinary mixed duties of a farm hand, but is a matter of skilled occupation pursued by a person

not engaged as a farm hand, is industrial and not agricultural labor.'

"Whether this states a correct proposition of law we do not undertake to determine. It has no application here. Under the evidence all the employees were engaged in the same business; that of harvesting a lettuce crop. The mere statement of what they were doing shows it was not skilled work, but common labor; also, that there were no mixed duties. The Industrial Commission's findings are that such work was agricultural and that the employers had not elected to be subject to the Compensation Law. If the commission had found the employers were within the provisions of the Act, it would have been contrary to both the facts and the law. In Hight *vs.* Industrial Commission, supra, one of the questions was whether a cow hand whose task was to look after cattle was engaged in agricultural work, and we held that he was. We quoted from three standard works the definition of 'agriculture', and all of them agreed that it includes; one says 'harvesting of crops', another 'removing the crops', and the other, 'gathering in the crops.' In other words, the harvesting of a crop is just as essentially agricultural as is the planting and cultivating of it to maturity.

"Nor do we think the incident of ownership changes the character of the work of harvesting from agricultural to industrial or commercial work. Where lettuce is grown as a commercial article, as in Arizona, it must be cut, picked, and carted for the market, and whether by the grower or the purchaser the work is agricultural. It does not cease to be agricultural on change of ownership, as where the grower before it is harvested sells the crop to a third person who harvests and markets it." 76 P. (2d) 1167.

VII. Whatever Doubt May Have Existed About the Meaning of the Term as Originally Used Has Been Settled by the Amended Act.

1. The Rule of Construction.

This Fifth Circuit Court of Appeals has previously held that the language of the amended act must be taken as explanatory of the original intent in *United States* v. *Turner Turpentine Company*, 111 F. (2d) 400, 404, as follows:

> "As to the 1939 Amendment of the Social Security Act, we agree with appellees that it is to be regarded as interpretive and explanatory of the term as it was used in the original act, and that it is itself a binding and final congressional declaration of what was meant by the term 'agricultural labor' as there used."

That utterance is not a novel rule of construction, but one which has always prevailed from the earliest times.

> *463: "Several acts in pari materia, and relating to the same subject, are to be taken together, and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule was declared in the cases of Rex *v.* Loxdall, and the Earl of Ailesbury *v.* Patterson; and the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and *464 harmonious in its several parts and provisions. Vol. I, Kent's Comm., *463, *464.
>
> "If in a subsequent clause of the same act provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense

of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.

Alexander *v.* The Mayor, 5 Cr. 8, Marshall, C. J.

"The force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. If it follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law, it is entitled to great weight."

Per Ruger, Ch. J., People ex rel. West Chester Fire Insurance Co. *v.* Davenport, 91 N. Y. 574.

U. S. *v.* Coulby, 251 Fed. 982-985. Affirmed 258 Fed. 27.

2. The Legislative History.

The defendant below, in an effort to avoid the full import of this rule of construction, sought solace from a technical treatment of isolated passages in the various committee reports. The substance of their argument depends upon a treatment of the word "law" as contained in congressional reports as meaning only the law as it truly existed, rather than the law as it was being administered. When we give the latter meaning to the congressional treatment of the status quo at the time of amendment, all of the doubts which the defendants below seek to cast upon what is otherwise clear are dispelled.

The Fifth Circuit Court of Appeals appears to have been misled by Social Security Act Amendments of 1939 (H. Rep. 1461, 76th Congress, First Session), providing as follows:

"The managers on the part of the House desire to state that the changes made by this bill with respect to agricultural labor do not take effect until January 1, 1940, and therefore have no effect whatsoever on any

litigation now in the courts with respect to what constitutes agricultural labor under present law" (pp. 20-21).

It is interesting to speculate upon the purpose of that language. Its purpose becomes clearer when we refer to the congressional debates which preceded it and which followed the separate Committee Reports of the House and Senate.

By referring to the Congressional Record, Vol. 84, Part 6, Pages 6864, 6865, we find the following passage in the debates beginning with the statements of Mr. Buck, who was the floor leader of the Committee of the House which steered the 1939 Amendments to passage:

> "The exemption contained in the original act is justified and should be continued. The clarifying paragraphs that the Ways and Means Committee has put into this bill are merely for the purpose of interpreting the original decision of Congress that agricultural labor should be exempt. These paragraphs are based on the theory that what is agricultural labor is determined by the nature of the work and not by whom the man is employed. Agricultural labor starts with the planting of a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be regarded as in the nature of agricultural labor.
>
> "Mr. Woodruff of Michigan: Will the gentleman yield?
>
> Mr. Buck: I yield to the gentleman from Michigan.
>
> Mr. Woodruff of Michigan: May I direct attention to the bottom of page 51?
>
> "May I offer a tribute to the work of the gentleman from California in connection with clearing up a misunderstanding that seems to have existed in the Treasury Department in its interpretation of the will of Congress as outlined in the Social Security Act.
>
> "Mr. Buck: I thank the gentleman.

Mr. Woodruff of Michigan: In that connection I will go into the matter further when the gentleman is ready to yield.

Mr. Buck: The gentleman may propound his question and perhaps I can answer it as I proceed.

Mr. Woodruff of Michigan: I find at the bottom of page 51 the following sentence:

"Services performed on a farm in connection with the raising, feeding, and management of fur-bearing animals, such as foxes, not now exempted, will be exempt under paragraph I.

"At the bottom of page 53 I find the following:

"The term, for example, includes fur-bearing animal farms. Under the present law, services performed in connection with the operation of such farms constitute covered employment.

"As a matter of fact, is it not true that that is simply an interpretation of the law by the Treasury Department and is not covered in the law itself?

"Mr. Buck: I think the gentleman is correct in his conclusions. The law clearly exempts 'agricultural labor'. Our difficulty has been to make the Treasury understand what 'agricultural labor' is. I would like to develop that in connection with two or three other rulings the Treasury Department has made, if the gentleman does not mind." * * *

"Mr. Hawks: Mr. Chairman, will the gentleman yield?

Mr. Buck: I yield to the gentleman from Wisconsin.

Mr. Hawks: In connection with the sentences to which the gentleman from Michigan called attention, I wonder if the fur farmers who have been paying these taxes under the language used in the report will receive any repayment?

Mr. Buck: I cannot tell the gentleman that. I will say this much, that in the opinion of those of us who helped to draw this amendment these various services which form an integral part of agriculture were in-

tended to be covered by Congress in its original enactment; but, frankly, I cannot tell the gentleman what the situation would be in regard to the problem there.

Mr. Hawks: It is not quite fair that they should have been taxed purely under a regulation issued by the Department.

Mr. Buck: I take it that they have their recourse to the courts under those circumstances; there is no question about that." Id. 6864, 6865.

It is plain from the foregoing that the only fear of Congress with reference to the amendments was that they might be given the effect which the Fifth Circuit Court of Appeals assigned to them because of some of the loose language contained in the separate House and Senate Reports (H. Rep. No. 728, 76th Congress, First Session; Senate Report No. 734, 76th Congress, First Session) wherein references to "existing law" is sought to be construed as referring to the existing congressional intent. As a matter of fact, it is plain that Congress only intended in using the term "existing law", to refer to the administration of the existing statute.

The sequence of events then is: first, the Congressional Committee loosely used the term "existing law"; second, the Committee representative upon being questioned assured the House that such language was not intended to be so construed, and that the amendment was plainly clarifying of the original intent; and third, in order to cure the objection, the Joint Committee made it plain that the amendment and the circumstances surrounding its adoption could not be used to cure the results of administrative error under the law as it previously existed.

Likewise, the Senate and House Reports in many places indicate an intent to merely clarify rather than change the previous intent. For example:

"Paragraph (I) (Section 1426(b)) continues the exception of agricultural labor, but a new subsection (L) defines the term for the purpose of the exclusion." (H. Rep. 60, 73, S. Rep. 74, 85.)

It seems from an examination of the reports that there is nothing contained in them which indicates any intent to have enacted a new or different meaning of the term "agricultural labor" as it might have been properly construed prior to the amendment.

Respectfully submitted,

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Office - Supreme Court, U. S.
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No. 112

In the Supreme Court of the United States

OCTOBER TERM, 1942

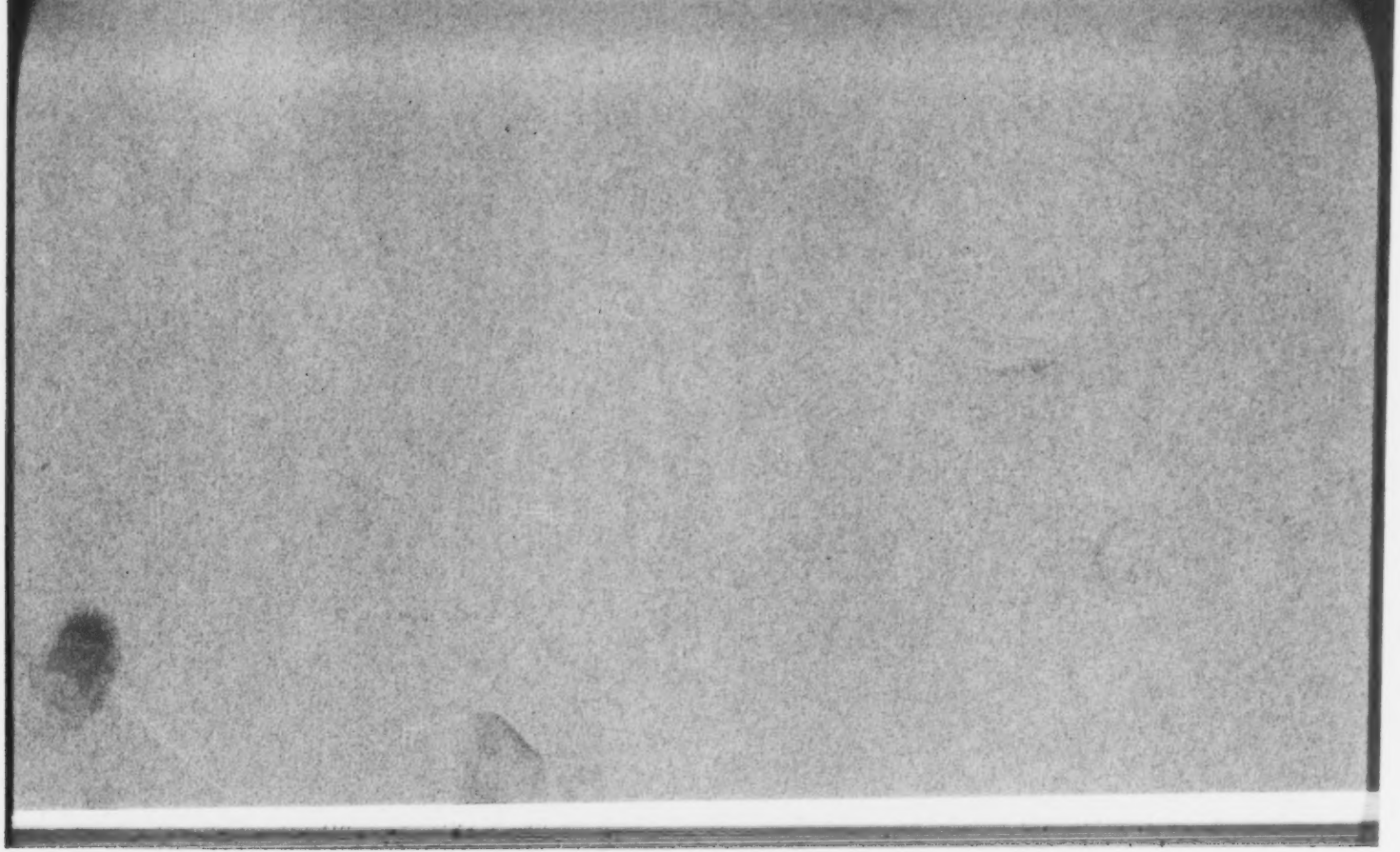
CHESTER C. FOSGATE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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OPINIONS BELOW

The oral remarks of the district court (R. 66–67) are not reported. The opinion of the circuit court of appeals (R. 95–100) is reported in 125 F. (2d) 775.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 6, 1942 (R. 100). A petition for rehearing (R. 101) was denied on March 7, 1942 (R. 107). The petition for a writ of certiorari was filed on June 2, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether wages paid by the taxpayer for labor performed in picking and preparing for market citrus fruit grown by others and purchased on the trees at maturity by the taxpayer, were exempt from the tax imposed by Title IX of the Social Security Act as wages paid for "agricultural labor" within the meaning of Section 907 (c) (1) of that Act.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 8–11.

STATEMENT

This is a suit for the refund of taxes paid for the year 1937 under Title IX of the Social Security Act of August 14, 1935, c. 531, 49 Stat. 620. The findings of fact entered by the district court (R. 68–69) may be summarized as follows:

Taxpayer, a corporation operating a citrus fruit packing house in Forest City, Florida, was engaged in purchasing, raising, processing, packing, and selling citrus fruit, and in cultivating groves owned by others (R. 68). Approximately 75 percent of the fruit processed and packed by it was purchased on the trees when ripe and gathered from groves owned and cultivated by others (R. 68–69). This was a commercial and not an agricultural enterprise (R. 69). Smaller amounts of fruit were bought on the trees in groves cultivated by the taxpayer under oral agreements with the owners, or

were gathered from groves owned or leased by the taxpayer. Accordingly, taxpayer had employees engaged variously (a) in cultivating and raising the fruit and (b) in picking, hauling, processing, packing, and selling it (R. 68–69).

The district court divided the employees into three classes for the purposes of determining liability for tax. The first group was made up of employees performing services with respect to fruit from groves owned or leased by the taxpayer. Their wages were held exempt from tax. The services of the second group, employees engaged in raising fruit in groves owned by others but tended by taxpayer, were likewise declared to be agricultural labor and the wages exempt from tax. The third group was made up of employees engaged in picking, hauling, processing, packing, and selling fruit from groves neither owned nor leased by the taxpayer. Their services were held not to be agricultural labor and their wages subject to the tax. Since the taxpayer had failed to show the amount of taxes paid on account of wages for picking and preparing for market fruit from its own groves, the judgment in its favor allowed recovery only for taxes paid on account of wages for services in cultivating and caring for the groves (R. 70–71).

Both parties appealed (R. 72, 85–86). Taxpayer urged that the district court erred in holding the wages of the third class of employees to be subject to the tax. The Government argued that

although the wages of the first class were not taxable, the services of the employees in the second class were not agricultural labor and their wages had been correctly taxed. The circuit court of appeals affirmed the judgment of the district court (R. 100). Because there is no conflict of decisions, the Government does not seek further review of the adverse portions of the judgment below. Consequently, the only question before the Court is whether the employees who picked, hauled, processed, packed, and sold fruit grown in groves which were neither owned nor leased by the taxpayer, were performing "agricultural labor" so that the wages paid them were excepted from social security taxes.

ARGUMENT

The Social Security Act Amendments of 1939[1] laid at rest for the future the question presented by the instant case. Section 614 of the amendments now provides a detailed definition of "agricultural labor." Consequently, the question presented relates only to past years and has a very limited importance. Moreover, as petitioner concedes, there is no conflict of decisions.[2]

---

[1] C. 666, 53 Stat. 1360.

[2] The question presented by the Government's appeal below was whether the exemption of "agricultural labor" extends to the employees of one who is engaged in the business of furnishing cultivating services to farmers. That question was decided adversely to the Government but certiorari has not been sought in view of the absence of a conflict. A simi-

The decision below correctly holds that employees engaged in picking, hauling, processing, packing and selling fruit grown in groves neither owned nor leased by the taxpayer, were not performing "agricultural labor" within the meaning of Section 907 (c) (1) of Social Security Act. In so deciding the court followed the Treasury Regulations promulgated under Title IX. Regulations 90, Article 206 (1), in its substance defines "agricultural labor" to exclude activities incidental to commercial enterprises marketing farm products, unless the services are performed by an employee of the owner or tenant of the farm. The generality of the statutory term "agricultural labor" made it unusually suitable for administrative construction. *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326; *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 102. The regulation is clearly reasonable. Whatever the difficulties of imaginary cases, the employees serving the owner or tenant of a farm generally stand in a very different position from the employees of a merchant or manufacturer who finds it convenient to come to the farm to garner its products. Cf. *North Whittier Heights C. Assn.* v. *National Labor Rela-*

---

lar question is now pending in the Ninth Circuit in *Stuart* v. *Kleck*, on appeal by the Government from a decision of the District Court for the District of Arizona, not officially reported, but found in C. C. H. Unemployment Insurance Service, Vol. 1, par. 8939. But even if a conflict should eventually develop upon that question, it would not touch upon the question presented by the instant petition.

tions Board, 109 F. (2d) 76 (C. C. A. 9), certiorari denied, 310 U. S. 632. This was a peculiarly appropriate place to draw the line under Section 907 (c) (1), for it takes account of the practicalities of tax collection, and both the House and Senate Committees had explained that the exemption was dictated by difficulties of collecting the tax if it were imposed upon wages for agricultural labor. See H. Rep. 615, 74th Cong., 1st Sess., p. 53; S. Rep. 628, 74th Cong., 1st Sess., p. 45.

The legislative history of Section 614 of the Social Security Act Amendments of 1939 shows that that section was not intended to be declaratory of the prior law. On the contrary, the committee reports reveal that Congress knew of the prior administrative practice and, accepting it for the past, broadened the exemption for the future. See H. Rep. 728, 76th Cong., 1st Sess., pp. 2, 18, 51–52; S. Rep. 734, 76th Cong., 1st Sess., pp. 2, 19, 61–62. And this is further shown by the express provision, contained in Section 614 alone, that the new definition should not take effect until January 1, 1940.

---

[3] See also H. Conference Rep. No. 1461, 76th Cong., 1st Sess., pp. 20–21:

"The managers on the part of the House desire to state that the changes made by this bill with respect to agricultural labor do not take effect until January 1, 1940, and therefore have no effect whatsoever on any litigation now in the courts with respect to what constitutes agricultural labor under present law."

CONCLUSION

There is no conflict of decisions or question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 1942.

APPENDIX

Social Security Act, c. 531, 49 Stat. 620:

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE—IMPOSITION OF TAX

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

* * * * *

(U. S. C., Title 42, Sec. 1101.)

DEFINITIONS

SEC. 907. When used in this title—

* * * * *

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

* * * * *

(U. S. C., Title 42, Sec. 1107.)

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360:

SEC. 614. Effective January 1, 1940, section 1607 of the Internal Revenue Code is amended to read as follows:

"SEC. 1607. DEFINITIONS.

"When used in this subchapter—

* * * * *

(l) *Agricultural labor.*—The term "agricultural labor" includes all service performed—

"(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

"(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

"(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to

market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

"As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards" (U. S. C. Title 26, Sec. 1607).

Treasury Regulations 90, promulgated under the Social Security Act.

ART. 206 (1). *Agricultural labor.*—The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of livestock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute "agricultural labor," however, unless they are performed by an em-

ployee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinary accepted sense, and includes stock, dairy, poultry, fruit and truck farms, plantations, ranches, ranges, and orchards.

Forestry and lumbering are not included within the exception.

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